

TERRY E. SEIFERT
Claimant

BLAKEMORE ENERGY PRODUCTS, INC.
Respondent

FARM BUREAU MUTUAL INSURANCE COMPANY }
Insurance Carrier

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record, hearing argument and considering the briefs of the parties, the Appeals Board finds that the Award by the Administrative Law Judge should be affirmed.

Respondent places great store in the surveillance videotape. The tape is significant not only for what it depicts, but also for the contrast between it and the claimant's testimony. The claimant denied performing tasks which the videotape shows him performing. This discrepancy calls into question the claimant's credibility. Dr. Randall L. Hendricks was clearly impressed with the videotape. He commented that it was like viewing a different person from the one he saw in his office. The claimant's guarded behavior and forward bent posture which he presented at Dr. Hendricks' office were not present in the videotape. Based upon his viewing of the videotape, Dr. Hendricks modified his restrictions somewhat. By contrast, Dr. John J. Wertzberger was not impressed with what he saw on the videotape. He saw nothing which caused him to change his opinions.

The Appeals Board finds the videotape and testimony of the investigator, Robert Douglas Keal, to be important but only as one of the many factors to be considered. It is probable that the claimant is capable of performing tasks beyond that to which he admits. In this respect, Dr. Wertzberger's restrictions are likely too limiting. This may in part be due to his admitted reliance upon the claimant's history and complaints in establishing those restrictions. On the other hand, Dr. Hendricks' restrictions do not seem restrictive enough given the two surgeries claimant has undergone, his objective findings and the results from the physical therapy and functional capacity examinations he ordered. Claimant's actual abilities fall somewhere between the opinions of the two physicians. For this reason both should be considered. Similarly, the vocational expert testimony of both Karen Terrill and Dick Santner should be considered, utilizing both physicians' restrictions. The opinions of the vocational experts with regard to labor-market loss and loss of ability to earn a comparable wage are found in the Administrative Law Judge's Award. The Kansas Supreme Court approved a method of averaging labor-market loss with wage loss in the case of Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). Applying the Hughes formula to the various percentage opinions given in this case would result in a work disability which would approximate the 31 percent functional impairment. The Administrative Law Judge gave greater weight to the labor-market loss than to the wage loss in arriving at her finding of a 45 percent work disability. A strict averaging of the opinions is not required. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). The Appeals Board considers the approach taken by the Administrative Law Judge to be appropriate under the facts and circumstances of this case. While we do not agree with the contention of claimant's counsel that claimant is essentially unemployable and that a permanent total disability award should be entered, the Appeals Board does find that claimant's job prospects are extremely limited and the likelihood of his finding work is small. On the other hand, the Appeals Board is mindful of the fact that claimant voluntarily terminated vocational rehabilitation services and has made almost no effort to find employment on his own.

Based upon the record as a whole, the Appeals Board finds that the Award of the Administrative Law Judge should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 29, 1996 should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
Leigh C. Hudson, Fort Scott, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director